

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

KAMIEL L. FOSKEY,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. 03:10-CV-06084-HU

FINDINGS AND RECOMMENDATION

Drew L. Johnson
Kathryn Tassinari
Drew L. Johnson, P.C.
1700 Valley River Drive
Eugene, OR 97401

Attorneys for Plaintiff

Dwight C. Holton
United States Attorney
Adrian L. Brown
Assistant United States Attorney
1000 S.W. Third Avenue, Suite 600
Portland, OR 97204-2904

Richard A. Morris
Special Assistant United States Attorney
Office of General Counsel
Social Security Administration
701 5th Avenue, Suite 2900 M/S 221A
Seattle, WA 98104-7075

Attorneys for Defendant

1 - FINDINGS & RECOMMENDATION

1 HUBEL, Magistrate Judge:

2 The plaintiff Kamiel L. Foskey¹ brings this action for
3 judicial review of a decision by the defendant Michael J. Astrue,
4 Commissioner of Social Security (the "Commissioner"), not to reopen
5 the denial of Foskey's September 15, 2000, application for Child's
6 Insurance Benefits ("CIB"). In response to Foskey's opening brief
7 in the case, Dkt. #14, the Commissioner has filed a motion to
8 dismiss the case for lack of subject matter jurisdiction, or
9 alternatively, should the court determine that it does have
10 jurisdiction, for a decision on the merits that the Commissioner's
11 denial of reopening did not violate Foskey's constitutional right
12 to due process. Dkt. #18; see Dkt. #19, supporting memorandum.
13 Foskey has filed a response to the motion to dismiss. Dkt. #20.

14 The court held a brief hearing on the Commissioner's motion on
15 July 14, 2011. Subsequently, with leave of court, Foskey filed a
16 supplemental brief, Dkt. #23, and the Commissioner filed a
17 supplemental response, Dkt. #24.

18 Foskey currently is 43 years old. He has minimal work
19 history, none of which amounted to substantial gainful activity.
20 Unlike most administrative records in Social Security appeals, the
21 record in this case does not contain the claimant's complete
22

23 ¹The administrative record contains numerous documents listing
24 the claimant as "Kurtiss Foskey" and "Kurtis Foskey," and even
25 containing the signature of "Kurtis Foskey." See, e.g., A.R. 59,
26 98, 99, 122. The Social Security number in the record for "Kurtis
27 Foskey" is the same as the SSN for "Kamiel Laurice Foskey," and the
28 determination letters in the file are addressed to "Kamiel Laurice
Foskey." The court is confident from a review of the record that
all references in the record to "Kurtiss," "Kurtis," and "Kamiel"
Foskey are to the same individual, who is the named plaintiff in
this case.

1 medical history. There are several psychological evaluations
2 dating from 1987 through 2002 (see A.R. 129-170), and brief medical
3 records substantiating the fact that Foskey "was involved in a
4 significant accident as a youth resulting in significant head
5 trauma." (A.R. 172) He suffers ongoing physical and mental
6 symptoms from the accident, and the Commissioner has found him to
7 be disabled as of July 9, 1987, when he was 19 years old. (A.R.
8 10) His disability is based on a severe personality disorder "with
9 features of anxiety," and his impairment meets the criteria of
10 Listing 12.08. *Id.* Foskey's request for judicial review concerns
11 only the Commissioner's decision not to reopen his January 2000 CIB
12 claim.

13 Consideration of the Commissioner's motion to dismiss will be
14 facilitated by a recitation of the somewhat complex procedural
15 history of Foskey's path through the maze of programs administered
16 by the Social Security Administration.

17 18 **PROCEDURAL HISTORY**

19 11/87 Foskey completed an Activities of Daily Living report
20 (A.R. 93-98), and a Disability Report (A.R. 99-106),
21 apparently for the state agency (see A.R. 107, Case
22 Management Assessment Guide dated 11/27/87; and Voca-
23 tional Report, A.R. 115-20, completed on Social Security
24 forms). Nothing in the record references any application
25 for DI benefits filed by Foskey at this time, so the
26 purpose for which these forms were completed or an agency
27 assessment was undertaken is unclear.

1 10/16/92 Foskey applied for Supplemental Security Income ("SSI")
 2 benefits under Title XVI of the Social Security Act, 42
 3 U.S.C. § 1381 *et seq.* (A.R. 45)

4 11/15/92 Foskey applied for Disability Insurance ("DI") benefits
 5 under Title II of the Act. *Id.*

6 Unknown Sometime after 11/15/92, the Commissioner approved
 7 Foskey's SSI and DI applications, with a disability onset
 8 date of 09/24/91. *Id.* Foskey began receiving both DI
 9 and SSI benefits "with initial entitlement beginning
 10 March 1992." (Dkt. #24, p. 2)

11 Unknown According to the Commissioner, Foskey's SSI benefits
 12 ended at some point "due to income higher than allowed
 13 (not related to disability)." (Dkt. #19, p. 2) Foskey
 14 is continuing to receive a monthly DI benefit of \$441.00.

15 09/15/00 Foskey filed an application for Child's Disability
 16 Benefits ("CDB") as the survivor of his mother Yulonda
 17 Evans, who died in August 2000. It appears that Foskey
 18 alleged a disability onset date of May 1, 1973. (See
 19 A.R. 9, 17, 18; Dkt. #14, p. 2; Dkt. #19, p. 3)

20 02/01 Foskey's application for CDB was denied at the initial
 21 level. (A.R. 18) Foskey did not appeal.² (Dkt. #14,
 22 p. 2; Dkt. #19, p. 3)

23 / / /

24 / / /

25 / / /

26

27
 28 ²As discussed later in this opinion, Foskey claims he never
 received notice of the denial of his 2000 CDB application.

1 10/25/05 Foskey protectively filed³ a second application for CDB,
2 this time alleging a disability onset date of October 1,
3 1992. (A.R. 9, 18, 45, 91-92)

4 11/15/05 Foskey's second CDB application was denied at the initial
5 level. (A.R. 9, 18; Dkt. #14, p. 2; Dkt. #19, p. 3)

6 01/04/08 Foskey protectively filed a third application for CDB,
7 alleging a disability onset date of May 1, 1973. (See
8 A.R. 42)

9 02/11/08 Foskey's third CDB application was denied. (A.R. 47-49)

10 02/19/08 Foskey requested reconsideration of his third CDB claim.
11 (A.R. 50-51)

12 02/29/08 Foskey's request for reconsideration of his third CDB
13 application was denied on the basis that his "application
14 concern[ed] the same issues which were decided when an
15 earlier claim was denied." (A.R. 52; see A.R. 52-54)

16 04/23/08 Foskey requested an ALJ hearing on his third CDB
17 application. (A.R. 55)

18 05/22/08 ALJ Marilyn S. Mauer issued an Order of Dismissal of
19 Foskey's request for hearing on the basis of *res*
20 *judicata*, noting Foskey's second and third CDB applica-
21 tions were based on the same facts and issues, and
22 therefore the denial of his second CDB claim remained
23 "final and binding." (A.R. 42-43)

24 / / /

26 ³The decisions of the Appeals Council reference a filing date
27 of 10/25/05, while the agency-generated claim form is dated
28 11/08/05. Thus, the 10/25/05 date must have been a protective
filing date.

1 07/19/08 Foskey sent a letter to the Appeals Council, requesting
2 review of the denial of his third CDB claim. In the
3 letter, he stated he had never received the denials of
4 his first and second CDB claims, and the only denial he
5 had ever received was the denial of his third CDB claim.
6 He stated all mailings related to his first CDB claim had
7 been mailed to the wrong address, a house formerly
8 belonging to his mother that "had been sold by the time
9 [he] supposedly received [the] denial [of his first CDB
10 claim]." (A.R. 59) He further stated he had been
11 attempting to obtain a copy of the denial of his second
12 CDB claim for "over two years," but the Agency had been
13 unable to "find the denial they sent in 2005." *Id.*
14 Foskey stated he had been "disabled since 1974 as the
15 result of a severe head injury," and he claimed the
16 Agency had "had [him] misdiagnosed in their files since
17 [he] first started receiving SSI in 1992." *Id.*

18 09/11/08 The Appeals Council vacated the dismissal of Foskey's
19 third CDB claim and remanded the case to the ALJ for
20 further proceedings. The Appeals Council noted it had
21 been "unable to locate the evidence from the prior
22 applications for Child's Insurance Benefits filed on
23 October 25, 2005 and September 15, 2000, respectively."
24 (A.R. 45) However, the Appeals Council had "associated
25 the evidence from a claim for [DI] benefits filed
26 November 15, 1992 and an application for [SSI] benefits
27 filed October 16, 1992." *Id.* Noting Foskey had been
28 "approved for disability as of September 24, 1991, the

1 alleged onset date," the Appeals Council found that "res
2 *judicata* dismissal of the [third CDB claim] [was]
3 inappropriate because there [was] no evidence that the
4 prior determinations were made based on the same
5 evidentiary facts as now [were] present in this case."
6 *Id.* The Appeals Council noted Foskey's 1992 claims had
7 been approved based on a finding that his "mental
8 impairments met the severity of Listing 12.08
9 (personality disorders)." *Id.* They further noted Foskey
10 had engaged in "some work activity" after he attained the
11 age of 22, on May 12, 1990. *Id.* The Appeals Council
12 directed the ALJ, upon remand, to do the following:

13 [A]ssociate the new evidence and conduct
14 a substantive hearing on the issue of
15 child's insurance benefits (disability).
16 Clarify the alleged onset date. Evaluate
17 [Foskey's] work during the period at
18 issue, which includes episodes of work as
19 a fast food worker and as a janitor in a
20 theater. Identify periods of substantial
21 gainful activity, if any. If warranted
22 and available, the [ALJ] will obtain
23 evidence from a medical expert to clarify
24 the nature and severity of [Foskey's]
25 mental conditions during the period at
26 issue prior to September 24, 1991. Rule,

27 / / /

28 / / /

as appropriate, at each step of the sequential evaluation process (20 CFR 404.1520).

Id.

01/23/09 Foskey obtained counsel to represent him. Prior to this time, he had been acting *pro se*.

06/11/09 The ALJ held a hearing on Foskey's third CDB claim. Foskey appeared at the hearing with his attorney. Foskey testified briefly at the hearing, and medical expert Dr. John Crossen also testified. The ALJ noted that she had been "directed to get the testimony of a medical expert to consider any information that was available about [Foskey's] entitlement to benefits between the alleged onset date of May 1, 1973 and September 24, 1991." (A.R. 186) In that regard, Dr. Crossen testified that in his opinion, Foskey met the disability criteria for Listing 12.08 (personality disorders). The earliest date he could pinpoint for the diagnosis was July 9, 1987, when Foskey underwent a psychological evaluation. (A.R. 189)

10/27/09 The ALJ issued her decision, finding Foskey had not engaged in substantial gainful activity since July 9, 1987, "the established onset date." (A.R. 36) She found the record contained no evidence that Foskey was disabled prior to that date. *Id.* The ALJ found Foskey to have an impairment of Listing-level severity, as follows:

[H]e has a deeply ingrained, maladaptive pattern[] of behavior associated with

1 pathologically inappropriate suspicious-
 2 ness, oddities of thought, perception,
 3 speech, and behavior, as well as intense
 4 and unstable interpersonal relationships
 5 and impulsive damaging behavior. . . .
 6 [H]is impairment has caused moderate
 7 restriction in activities of daily
 8 living, marked difficulties in maintain-
 9 ing social functioning, marked diffi-
 10 culties in maintaining concentration,
 11 persistence or pace, and no episodes of
 12 decompensation, each of extended dura-
 13 tion.

14 (A.R. 37)

15 11/04/09 Foskey requested review by the Appeals Council, stating:
 16 "My applications for benefits from 9/00 and 11/05 should
 17 be re-opened because I was not accorded the due process
 18 rights allowed to me under the U.S. Constitution when
 19 these were denied. The ALJ with regard to the present
 20 decision failed to even discuss my request for re-opening
 21 made at Hearing on 6/11/09." (A.R. 16; see A.R. 193,
 22 where the ALJ and Foskey's attorney agree that no
 23 additional evidence was needed "regarding the re-opening
 24 of prior applications")

25 02/03/10 The Appeals Council issued its decision, adopting the
 26 ALJ's findings and conclusions regarding Foskey's
 27 disability as of July 9, 1987. The Appeals Council
 28 reopened the 11/15/05 decision on Foskey's 10/25/05

1 application "[i]n accordance with 20 CFR 404.988(b)."⁴
 2 (A.R. 9) However, because the 02/01 determination of
 3 Foskey's 09/15/00 application "was issued over four years
 4 prior to January 4, 2008," the Appeals Council found no
 5 basis upon which to reopen the application under the
 6 criteria set forth in 20 C.F.R. § 404.988(b). *Id.* The
 7 Appeals Council noted: "In accordance with 20 CFR
 8 404.903(1)⁵, denial of the request for reopening of the
 9 September 15, 2000 application is not subject to judicial
 10 review." *Id.* The Appeals Council's decision overruled
 11 the 2005 denial of benefits, resulting in Foskey's
 12 entitlement to CDB "[b]ased on the applications filed on
 13 October 25, 2005 and January 2, 2008."⁶ (A.R. 11)
 14
 15

16 ⁴"A determination . . . may be reopened . . . [w]ithin four
 17 years of the date of the notice of the initial determination if we
 18 find good cause, as defined in § 404.989, to reopen the case[.]"
 19 20 C.F.R. § 404.988(b). Section 404.989 provides that good cause
 20 includes the furnishing of new and material evidence; a clerical
 21 error in computing or recomputing benefits; or when the evidence of
 22 record "clearly shows on its face that an error was made." 20
 23 C.F.R. § 404.989. A case will not be reopened "if the only reason
 24 for reopening is a change of legal interpretation or administrative
 25 ruling upon which the determination or decision was made." *Id.*

26 ⁵"Administrative actions that are not initial determinations
 27 may be reviewed by [the Agency], but . . . they are not subject to
 28 judicial review. These actions include, but are not limited to, an
 action . . . [d]enying your request to reopen a determination or a
 decision[.]" 20 C.F.R. § 404.903(1).

⁶The January 2, 2008, date appears to be a typographical
 error. At the beginning of the decision, the Appeals Council noted
 the date of Foskey's application to be January 4, 2008. (A.R. 9)
 Similarly, the ALJ indicated Foskey "protectively filed" his
 application on January 4, 2008. (A.R. 42)

1 Foskey currently receives monthly benefits of \$656.00 on
2 his 2008 and 2005 CDB applications. (Dkt. #24, p. 2)
3 04/06/10 Foskey filed a Complaint in this court to challenge the
4 Agency's decision not to reopen his 2000 application.
5 (See Dkt. #2) In his Complaint, Foskey claims the
6 Commissioner's refusal to reopen his 2000 application
7 "violates [Foskey's] right to due process under the
8 United States Constitution." *Id.*, ¶ 2.
9 09/01/10 The Commissioner filed his Answer, denying any violation
10 of Foskey's due process rights, and denying that the
11 court has jurisdiction, whether under 42 U.S.C. § 405(g)
12 or "any other basis." (Dkt. #10, ¶¶ II & IV)
13 11/2/10 Foskey filed his opening brief on the merits. (Dkt. #14)
14 03/02/11 In response to Foskey's opening brief, the Commissioner
15 filed his motion to dismiss and a supporting brief.
16 (Dkt. #18 & #19) He stated his intention that the motion
17 and supporting brief "also serve as his response to
18 [Foskey's] Brief [on the merits]." (Dkt. #18, p. 2)
19 03/16/11 Foskey filed his response to the Commissioner's motion to
20 dismiss. (Dkt. #20)
21 07/22/11 Foskey filed a supplemental brief. (Dkt. #23)
22 08/01/11 The Commissioner filed a response to Foskey's supple-
23 mental brief. (Dkt. #24)

24 25 **DISCUSSION**

26 The Social Security Act authorizes judicial review of "any
27 final decision of the Commissioner of Social Security made after a
28 hearing to which he was a party[.]" 42 U.S.C. § 405(g). The Act

1 itself provides that this is the exclusive basis for the court's
2 jurisdiction to review such decisions. See 42 U.S.C. § 405(h) ("No
3 . . . decision of the Commissioner of Social Security shall be
4 reviewed by any person, tribunal, or governmental agency except as
5 herein provided."); *Udd v. Massanari*, 245 F.3d 1096, 1098-99 (9th
6 Cir. 2001) ("A decision not to reopen a prior, final benefits
7 decision is discretionary and ordinarily does not constitute a
8 final decision; therefore, it is not subject to judicial review.")
9 (citing *Califano v. Sanders*, 430 U.S. 99, 107-09, 97 S. Ct. 980,
10 985-86, 51 L. Ed. 2d 192 (1977)).

11 The *Udd* court noted that this rule is subject to an exception
12 when the claimant raises "any colorable constitutional claim of due
13 process violation that implicates a due process right either to a
14 meaningful opportunity to be heard or to seek reconsideration of an
15 adverse benefits determination." *Udd*, 245 F.3d at 1099 (citing
16 *Califano*, 430 U.S. at 109, 97 S. Ct. at 986; *Evans v. Chater*, 110
17 F.3d 1480, 1483 (9th Cir. 1997)). A claimant may raise a colorable
18 constitutional claim by way of "[a] challenge that is not 'wholly
19 insubstantial, immaterial, or frivolous[.]'" *Id.* (quoting
20 *Boettcher v. Sec'y of Health & Human Serv.*, 759 F.2d 719, 722 (9th
21 Cir. 1985)).

22 In Foskey's July 19, 2008, letter appealing the ALJ's order
23 dismissing his request for hearing on his third CDB claim, Foskey,
24 at that time acting *pro se*, stated he had never received the
25 denials of his first and second CDB claims. (A.R. 59) He stated
26 he had been "disabled since 1974 as the result of a severe head
27 injury," and according to him, the Agency had been unable to locate
28 a copy of the denial of his second CDB claim. *Id.* In his

1 November 4, 2009, appeal, after he had obtained counsel to
2 represent him, he again requested reopening of his 2000 and 2005
3 applications, stating he "was not accorded the due process rights
4 allowed to [him] under the U.S. Constitution when these were
5 denied." (A.R. 16)

6 The Commissioner argues Foskey's claim, first raised in 2008,
7 that he never received notice of the denial of his first two CDB
8 claims, does not establish a colorable constitutional claim that he
9 was denied due process. With regard to Foskey's 2000 claim, the
10 Commissioner argues Foskey has "offered no explanation why he did
11 not pursue the issue of nonreceipt of a notice or a decision for
12 over seven years." Dkt. #19, p. 7. In response, Foskey asserts
13 that he suffered from a mental impairment that prevented him from
14 taking appropriate action when he did not receive notice that his
15 claim had been denied. Foskey asserts that if a claimant can
16 establish good cause for the delay in requesting review, a
17 colorable constitutional claim can be raised at any time,
18 "'regardless of how much time has passed since the prior
19 administrative action[.]'" Dkt. #20, p. 2 (quoting SSR 91-5p, 1991
20 WL 208067, at *2).

21 The Social Security Ruling cited by Foskey clarifies the
22 Agency's "policy on establishing good cause for missing the
23 deadline to request review." *Id.*, at *1. Specifically, the Agency
24 policy is to give "proper consideration . . . to a claimant who
25 presents evidence that mental incapacity may have prevented him or
26 her from understanding the review process." *Id.*, at *2. If a
27 *pro se* claimant can show that mental incapacity prevented him from
28 making a timely request for review of "an adverse determination,

1 decision, dismissal, or review by a Federal district court," then
 2 the Agency "will determine whether or not good cause exists for
 3 extending the time to request review." *Id.* The SSR explains the
 4 criteria for establishing that the time period to request review
 5 should be extended, as follows:

6 The claimant will have established mental
 7 incapacity for the purpose of establishing
 8 good cause when the evidence establishes that
 he or she lacked the mental capacity to under-
 stand the procedures for requesting review.

9 In determining whether a claimant lacked the
 10 mental capacity to understand the procedures
 11 for requesting review, the adjudicator must
 consider the following factors as they existed
 at the time of the prior administrative
 action:

- 12 - inability to read or write;
- 13 - lack of facility with the English lan-
 guage;
- 14 - limited education;
- 15 - any mental or physical condition which
 limits the claimant's ability to do
 things for him/herself.

16 If the claimant is unrepresented and has one
 17 of the factors listed above, the adjudicator
 18 will assist the claimant in obtaining any
 19 relevant evidence. The decision as to what
 constitutes mental incapacity must be based on
 all the pertinent facts in a particular case.
 The adjudicator will resolve any reasonable
 20 doubt in favor of the claimant.

21 *Id.*

22 Although the record indicates Foskey's "composite intelligence
 23 score places him in the superior range of intellectual functioning,
 24 his abilities are highly discrepant." (A.R. 137) He has marked
 25 difficulties with attention and concentration due to "a thought
 26 disturbance" (A.R. 137), and "significant difficulty in situations
 27 requiring relaxed, somewhat automatic attention[.]" (A.R. 136) He
 28 is likely to experience "severe concentrational difficulties" in

1 unstructured situations. *Id.* The ALJ found that Foskey's mental
2 impairments have met the Listing level of severity since July 9,
3 1987. (A.R. 37)

4 The *Udd* court held, "It is axiomatic that due process requires
5 that a claimant receive meaningful notice and an opportunity to be
6 heard before his claim for disability benefits may be denied."
7 *Udd*, 245 F.3d at 1099 (citing *Mathews v. Eldridge*, 424 U.S. 319,
8 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976)). Here, however,
9 the ALJ failed to address the issue of whether Foskey received
10 "meaningful notice and an opportunity to be heard" with regard to
11 his 2000 and 2005 claims. The Appeals Council declined to reopen
12 Foskey's 2000 claim on procedural grounds. Thus, no one on behalf
13 of the Agency has addressed Foskey's claim that he never received
14 notice that his 2000 claim was denied - an assertion that is
15 un rebutted by any evidence of record. The Agency has been unable
16 to locate its own records with regard to the 2000 denial. In
17 addition, even if he had received notice of the denial, the record
18 indicates he did not possess the mental capacity to seek meaningful
19 review.⁷

20 The court finds, based on the un rebutted evidence, that Foskey
21 never received notice that his 2000 claim had been denied,
22

23
24 ⁷The Commissioner also argues Foskey has failed to "explain
25 why he filed a new claim in 2005 if the September 2000 claim was
26 still pending or unresolved." Dkt. #19, p. 7. Foskey responds
27 that filing a new application in 2005 was "understandable" when he
28 had not received notice of a ruling on the 2000 application, and
"knowing to seek reopening of the 2000 application requires some
knowledge of the law and procedure on the issue." Dkt. #20, p. 2.
The court finds the Commissioner's argument to be unavailing under
these circumstances.

1 resulting in a denial of due process. Thus, Foskey has raised a
2 colorable constitutional claim that constitutes an exception to the
3 general rule that the Commissioner's decision not to reopen a prior
4 claim is not subject to judicial review. Further, the court finds
5 that even if he had received notice of the denial, Foskey lacked
6 the mental capacity to understand, and act in accordance with, the
7 appropriate procedures for requesting timely review of that
8 decision. Accordingly, I find that the court has jurisdiction to
9 consider Foskey's claim. I further find the evidence of record
10 establishes that his due process rights were violated when he was
11 not provided with meaningful notice that his 2000 claim had been
12 denied.

13 Ordinarily, when the court determines that a due process
14 violation requires the reopening of an application for benefits,
15 the case is remanded to the Commissioner for a ruling on the merits
16 of the claimant's disability claim for the period in question. See
17 *Udd*, 245 F.3d at 1101 (citing *Stieberger v. Apfel*, 1998 WL 556156,
18 at *11-12 (S.D.N.Y. 1998) (noting the Commissioner is obligated to
19 give claimant "the benefit of all reasonable doubts"; reversing
20 refusal to reopen because Commissioner failed to do so)). Here,
21 however, the Commissioner has already made the determination that
22 Foskey became disabled as of July 1987. This determination was
23 made in connection with Foskey's third CDB application, which
24 alleged a disability onset date of May 1, 1973 - the same alleged
25 onset date listed in Foskey's 2000 application. (Compare A.R. 9 &
26 18 with A.R. 42) "There is therefore no need for further adminis-
27 trative adjudication beyond the calculation of benefits[.]" *Udd*,
28 245 F.3d at 1102. The Ninth Circuit has made it clear that "where

1 the record has been developed fully and further administrative
 2 proceedings would serve no useful purpose, the district court
 3 should remand for an immediate award of benefits.'" *Strauss v.*
 4 *Comm'r*, 635 F.3d 1135, 1138 (9th Cir. 2011) (quoting *Benecke v.*
 5 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004)).

6 Thus, the court having found Foskey's due process rights were
 7 violated, the appropriate remedy is remand to the Commissioner with
 8 instructions to reopen Foskey's CDB 2000 claim, and to calculate
 9 and award appropriate retroactive benefits.⁸

11 **CONCLUSION**

12 I recommend denial of the Commissioner's motion to dismiss. I
 13 further recommend reversal of the Appeals Council's refusal to
 14 reopen Foskey's 2000 CDB claim, and remand with instructions to the
 15 Commissioner to reopen the 2000 claim, and to calculate and award
 16 retroactive benefits pursuant to the regulations.

17 / / /

18 / / /

19 / / /

21 ⁸The Commissioner explains that if Foskey's 2000 application
 22 is reopened, he will be entitled to retroactive CDB from
 23 September 15, 1999 (i.e., twelve months prior to his September 15,
 2000, application date), through September 2004 (i.e., one month
 24 prior to his existing CDB entitlement; see 20 C.F.R.
 § 404.621(a)(1)). Foskey's existing DI benefits of \$441.00 per
 25 month, and his existing CDB benefits of \$656.00 per month, will
 continue. See Dkt. #24, pp. 23-24.

26 Foskey agrees his retroactive benefits would begin in
 27 September 1999, but according to the Commissioner, Foskey's counsel
 made an error in calculating the exact time period for which Foskey
 28 would receive retroactive CDB benefits. Compare Dkt. #23, pp. 2-3
 with Dkt. #24, pp. 2-3.

SCHEDULING ORDER

These Findings and Recommendation will be referred to a district judge. Objections, if any, are due **September 30, 2011**. If no objections are filed, then the Findings and Recommendation will go under advisement on that date. If objections are filed, then a response is due by **October 18, 2011**. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

Dated this 12th day of September, 2011.

/s/ Dennis J. Hubel

Dennis James Hubel
Unites States Magistrate Judge